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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1018

THE FORT MOJAVE TRIBE, by and through its TRIBAL COUNCIL in Class Action on behalf of all members of said Tribe,

Petitioners,

v.

THE COUNTY OF SAN BERNARDINO, a political subdivision of the State of California,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Fort Mojave Tribe petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on September 28, 1976.

OPINIONS BELOW

The opinion of the District Court (Appendix B of this petition) is unreported. The opinion of the Court of Appeals (Appendix C of this petition) is reported at 543 F.2d 1253 (1976).

JURISDICTION

This is an action brought by an Indian tribe to determine whether leasehold interests in leases given by an IRA tribe on Indian lands to non-Indians are subject to taxation by a California county. The complaint was filed on November 8, 1973. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1353 and 1362 and 25 U.S.C. § 349. On September 20, 1974, the trial court held that the leasehold interests on Indian trust land were taxable. The matter was appealed to the United States Court of Appeals for the Ninth Circuit under 28 U.S.C. §§ 1291 and 1362. On September 28, 1976, that court affirmed. This Court has jurisdiction of this petition for certiorari under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Can a California county, acting under state law, validly impose a possessory interest tax upon leases of Indian trust land to non-Indians where the tribe is subject to the Indian Reorganization Act?

CONSTITUTIONAL PROVISIONS, STATUTES, ORDERS AND REGULATIONS INVOLVED

While a number of statutes will be referred to, the key statutes are the Wheeler-Howard Act, also referred to as the Indian Reorganization Act or IRA, 48 Stat. 984, 25 U.S.C. §§ 461-79; and Public Law No. 280, 67 Stat. 589, as amended, 18 U.S.C. § 1162 and 28 U.S.C. § 1360. Appropriate excerpts are contained in Appendix A.

STATEMENT OF THE CASE

A. *Background.*

This is chapter two of a story which began with *Agua*

Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971), Appendix D to this brief, a two-to-one decision in which certiorari was denied here, 405 U.S. 933, 92 S. Ct. 930, 30 L. Ed. 2d 809 (1972) (Justices Douglas, Brennan and Marshall dissenting). Reduced to a sentence, the issue in that case was whether the Riverside County possessory interest tax could, in the light of the applicable statutes, be imposed upon a non-Indian lessee of the Agua Calientes.

The court having upheld the tax in the *Agua Caliente* case, a second case was instituted involving the Fort Mojaves who are subject to a similar tax in San Bernardino County, California. The essential difference between the two situations is that a different statute applies to the Fort Mojaves than to the Agua Calientes; the Fort Mojave Tribe is organized under the Indian Reorganization Act of 1934, sometimes referred to as the Wheeler-Howard Act, commonly known as the IRA, *supra.* The courts below have held that this is not a sufficient distinguishing feature and have upheld the tax. At all times the Tribe has preserved for presentation here, along with the IRA question, its contention that the Circuit was wrong in the *Agua Caliente* case to begin with. The *Agua Caliente* record has been made part of this record to avoid duplicating testimony on economic factors and the nature of the tax involved.

B. *The Fort Mojave Tribe and Its Reservation.*

The Fort Mojaves occupy a reservation surrounded by three states, California, Nevada and Arizona, and divided by the Colorado River (T. 105). The tribe has 620 members of whom about half live on the reservation (T. 107). Its members are heavily unemployed (T. 107) and, as was more

fully developed in the *Agua Caliente* record, we are dealing with a bleak situation involving one of the most depressed groups in the continental United States.

The Fort Mojaves function under the rule of self-government and have done so from time immemorial. 7 Ind. Cl. Com. 219 (1959). They have a constitution and by-laws and an elective form of government (T. 109), and they operate under the IRA with a governing body (T. 109-10). They have special ordinances creating committees on education, on housing, on health, and a planning committee endeavoring to make something out of their only assets, the land and water of their reservation (T. 110-11). They have planning consultants to develop programs to make themselves self-sustaining (T. 111-12). To lift themselves out of their poverty-stricken condition, they clearly need to spend money, and for that purpose, in addition to seeking grants where they can obtain them, they have a taxing program (T. 114). As their tribal chairman put it: "We are a poor tribe, and we are trying to get on our feet. That is the only way they can do is do like other governing agencies." (T. 116). As part of their revenue and taxation program, they have their own possessory interest tax (T. 114-15).

At the time of the trial below, the Tribe had two leases (107-08). The tax by the County conflicted directly with tribal development policies in this regard; as a consequence, they lost one of their most lucrative leases, which was abandoned by the lessee because of the weight of the County's tax (T. 116-17).

C. *The Indian Reorganization Act.*

This Tribe is organized under the Indian Reorganization Act (IRA). Of the tribes in the continental United States

outside of Alaska, approximately 110 are under the Act and about 50 are outside it (T. 29); it is the basic charter for the government of about two-thirds of the tribes of the United States and has been for forty years (T. 30). A prime purpose of the statute is to permit the tribes to develop their own resources (T. 31).

This is a key purpose of the Act; it was intended to reverse the trend which had developed by which Indian land drifted into non-Indian hands. When the Act was adopted, of the 400,000 Indians then in America, approximately 100,000 were completely landless, a condition accentuated in the Depression when, for illustration, the Paiute Indians in Nevada were living on garbage dumps (T. 32).

The Act caused a 180-degree turn in Indian policy. To manage and develop their own land, the tribes were enabled to act as if they were counties or municipalities. They may, among other things, levy their own taxes and the Fort Mojaves do have a possessory interest tax of their own which they collect from lessees.

D. *County Taxation.*

The possessory interest tax is, put simply, a device for evading the legal prohibition of taxes on Indian lands. The County, under state law, taxes the leasehold interest, calls it a possessory interest tax, and collects the same amount it would as if it were taxing the Indians' land. See the record in the *Agua Caliente* case for detail (T. 234). The California legislature has authorized the counties to impose such taxes without authorizing any particular level of taxation, so that one county may tap the leases lightly and another hit them hard. In this case, San Bernardino taxes at the rate of some 2.25% of the appraised value of the land.

Inescapably, the county tax makes it harder for the Indians to develop their land. On this score there is some collision between the two circuit court opinions. In *Agua Caliente,* the court recognized that "[i]f an Indian's land is not subject to that tax he enjoys a better bargaining position than he otherwise would, and hence that the tax has an adverse economic effect upon him." 442 F.2d at 1186. In the instant case, the Court in its Footnote 2 declared that it did not know "whether it is *probable* that [the tax] will" put an economic burden on the Indians. 543 F.2d at 1255. (Emphasis in original).

The record is substantial and clear on this score, and the court was right the first time. A principal California lessee from the Fort Mojaves testified that he intends if possible to avoid a major economic development on the California side of the line because Nevada and Arizona do not presently have the tax (T. 85). As he says, "[O]bviously, the taxes involved on a plant of that magnitude would be a major [factor] as to where to locate it." (T. 87). The plain truth is that the general awkwardness of dealing with an Indian tribe and the Indian Bureau is such that unless there is some advantage in doing so, persons given free choice would rather not deal with the Indians; see for analysis the testimony of the witness Hill, a seasoned appraiser (T. 136). The leases are interests of both the lessor and the lessee, and the expert appraiser's testimony was that the operation of the tax diminished the value of the interest of both of them (T. 140-41). Other testimony was clearly to the effect that the continuing operation of the California tax was putting the Indian leases "in a less competitive position with fee lands." (T. 63).

Apart from the tax on land development, enforcement problems bear on the effectiveness of Indian control of their own lands. Under California law, if a lessee does not pay the tax the County may take and sell the property. Clearly the Tribe has lost all control of its leases if the County can sell the leasehold interest to a stranger over whom the Tribe has never had any approval or control at all. In *Agua Caliente, supra,* Footnote 16, the court noted that the county had made no attempt to seize or sell the interest of lessees. By the time of the *Fort Mojave* case, this was no longer so. In one case the County gave notice of a seizure and advertised to sell; the lessee paid the tax on the courthouse steps (T. 66). In the second case, notice of seizure was given. The Court of Appeals expressly notes in the *Fort Mojave* case that "California law permits the seizure and sale of personal property, improvements, and possessory interests of the assessee." It simply observes that it is "confident" that "accomodations are both legal and feasible." 543 F.2d at 1259.

E. *Decisions Below.*

Both the trial court and the Court of Appeals felt that this case was governed by *Agua Caliente* and therefore upheld the tax.

REASONS FOR GRANTING THE WRIT

1. This case represents the automaton operation of the law, a kind of machine-like inexorability. The trouble is that those are people in there, getting ground up by the machine. Apart from the human sadness of treating Indians this way, there is the intellectual sadness that the machine connections don't really fit. In the beginning this Court held that a state might impose a possessory interest tax upon a defense contractor operating on lands leased from the federal government. *United States v. Detroit,* 355 U.S. 466, 78 S. Ct. 474, 2 L.

Ed. 2d 424 (1958).

In *Agua Caliente*, the majority of the Court of Appeals treated as if it were a defense contractor an Indian tribe attempting to make something out of its land by leasing, the only means available to it, and upheld the tax on the authority of *United States v. Detroit.* The Court of Appeals further made analogy to *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342, 69 S. Ct. 561, 93 L. Ed. 2d 721 (1949), where a per barrel tax on oil extraction by lessees of Indian lands was upheld. The oil extracted belonged entirely to the oil company, and the tax was simply a kind of gross income tax on extractions, expressly noted by the Court to be minor in its consequences. From this the law moves with the routinized litany that whenever a white man leases land from an Indian on an Indian reservation, the state is perfectly free to tax the lease. The instant case is an illustration. For further example, see a recent decision following *Agua Caliente*, *Chief Seattle Properties, Inc. v. Kitsap County*, 86 Wash. 2d 7, 541 P.2d 699, 705 (1976). This opinion cites *Agua Caliente* for the proposition that a tax is valid where "the tax was assessed only against the lessee's interest in the land and not on the land itself, even though the land's rental value was decreased by the tax," with reference also to *City of Detroit, supra.*

This, respectfully, is mindless conformity. A decision that the United States government will, in effect, reimburse the states for permitting large defense industries to be developed on government land is fundamentally different from enriching a California county by dipping into the pockets of the most poverty stricken people in America as they seek to utilize the small remnant of land which the government has

left them.*

The Indians and their friends have unsuccessfully resisted this process of county aggrandizement at Indian expense since 1961. In that year, when the County of Riverside began taxing the first lease of the Agua Calientes, the Solicitor for the Sacramento Region of the Department of Interior became alarmed, reviewed the matter, and then rendered an opinion which in part stated:

> "It is a well-established principle of law that one may not do indirectly what he is prohibited from doing directly. The possessory interest tax as assessed and levied by Riverside County on leasehold interests in Indian lands appears to be a tax on trust lands despite the Federal prohibition against taxing such lands. Stated in other terms, it is an indirect method of taxing Indian lands which cannot be taxed directly. Also, it has been said that the power to tax involves the power to destroy; that taxation is a burden and theoretically may be laid so heavily as to destroy the thing taxed or render it valueless. The leasing and development program for Indian lands in the Palm Springs area could be seriously deterred or perhaps be completely frustrated if Riverside County persists in asserting a possessory interest tax."*

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* We have a vivid illustration of the practice described by Illinois Supreme Court Justice Walter Schaefer:

> "[M]uch more than in the past the lawyer's quest has become a search for quotable words which, regardless of their initial context, can be read in the abstract to bear upon the situation at hand. The pressure is thus toward a jurisprudence of words or phrases divorced from fact and capable of generating new words and phrases with independent lives." Schaefer, *Book Review*, 84 Harv. L. Rev. 1558 at 1559-60 (1971).

* Memorandum, January 13, 1966, of Frank B. Horne, *Agua Caliente* record. In a dispute with the counties, the Solicitor for the Department, in Opinion No. M36768, Feb. 7, 1969, ruled that the tax could not be applied because of its burden on the Indians. By the opinions of this Court, the opinion of the Interior Department on Indian Law is entitled to "great weight", *United States v. Jackson*, 280 U.S. 183, 193, 50 S. Ct. 143, 146, 74 L. Ed. 361 (1930). It has not had that great weight here.

2. So much for the functional differences. The decision below misconstrues the preemptive effect of the IRA. Section 16 of the IRA, 25 U.S.C. § 476, provides that tribes may organize, adopt a constitution and by-laws, and undertake self-government. Paragraph 2 of this section is as follows:

> "In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior: *to prevent the sale,* disposition, lease, or *encumbrance of* tribal lands, *interests in lands, or other assets without the consent of the tribe;* and to negotiate with the Federal, State, and local Governments." (Emphasis added).

This statute contains two prohibitions not in the statute under analysis in the *Agua Caliente* case. First, in addition to prohibiting any "encumbrance" on the lands themselves (which was the case in *Agua Caliente*), it also prohibits any encumbrance on "interests in lands," of which leases are an obvious example; for reiterated descriptions of leases as interests in land, *see* 1 *H. Tiffany, The Law of Real Property,* § 74, at 111 ("By the making of a lease an interest in land is transferred . . . ."); I *American Law of Property* § 3.12, at 205 (analysis of the lessee's interest in land); 2 *R. Powell, The Law of Real Property,* § 221 at 177 (analysis of the interest). Second, in the earlier case, the prohibition on taxation was restricted to property "belonging to any Indian or any Indian tribe," while there is no such limitation here.

The court below did not properly interpret the meaning and impact of these words. First, it is routine wisdom that the word "encumbrance" includes taxes; see, for example,

Cal. Civ. Code § 1114, "The term 'encumbrances' includes taxes, assessments, and all liens upon real property." *See also LaFond v. Frame,* 327 Mass. 364, 99 N.E.2d 51, 52 (1951); *Moore v. Gillingham,* 22 Wash. 2d 655, 157 P.2d 598, 601 (1945). Second, in the opinion of Mr. Robert Bennett, former Commissioner of Indian Affairs, who, in his early days at the Bureau, was deeply involved in the original orientation of Indian tribes to the IRA when adopted in 1934, the imposition of a possessory interest tax by the County upon lessees of Indian trust lands conflicts directly with the purpose of the IRA, which is intended to give economic self-sufficiency to the tribes (T. 41). The tax "places a burden on what Congress has authorized these tribes to do." (T. 42). Finally, as was held in *Squire v. Capoeman,* 351 U.S. 1, 6-7, 76 S. Ct. 611, 100 L. Ed. 883 (1956), for Indian purposes the word "encumbrances" reaches taxes:

> "The courts below held that imposition of the tax here in question is inconsistent with the Government's promise to transfer the fee 'free of all charge or encumbrance whatsoever'."

The Court below does not deal at all with the legal fact that any lease is an "interest in land" and that, therefore, the non-Indian lessee has an "interest in land" as much as any other lessee. The statute says precisely and exactly, in so many words, that there may not be an encumbrance on "interests in lands" held in trust for Indians without their consent, and yet that is exactly and precisely what is authorized here.

We deal with laws which are to be strictly construed to avoid permitting state encroachment upon Indian rights, benefits and powers. When Congress wishes to authorize states or counties to levy taxes, it knows precisely how to do so as it has demonstrated by giving exactly that authority over oil

and gas leases, 25 U.S.C. 398c. As this Court has just held in *Bryan v. Itasca County*, 96 S. Ct. 2102, 2112 (1976), a prohibition on "alienation, encumbrance, or taxation" will be read to give maximum protection. Here it has been read to give no protection at all.

3. We cannot, with the candor we owe the Court, assert an express conflict of decisions but we can properly assert a policy conflict. In the *Chief Seattle Properties, Inc.* case, *supra*, it is expressly noted that "if the State tax imposed on an Indian or a non-Indian would substantially interfere with a discernible federal policy to aid the Indian," it is invalid. 541 P.2d at 705. A further question is "whether the imposition of the tax will infringe on Indian rights of self-government," *G.M. Shupe, Inc. v. Bureau of Revenue*, 89 N.M. 265, 550 P.2d 277, 279 (1976); and see for reiteration of the necessity of avoidance of interference with Indian self-government, *Eastern Navajo Industries, Inc. v. Bureau of Revenue*, 89 N.M. 369, 552 P.2d 805, 810 (1976).

Another panel of the Ninth Circuit has recently exhibited considerably greater interest than the court below in the avoidance of interference with Indian development by state action. In *Santa Rosa Band v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied* January 10, 1977, the issue was whether a county could enforce its zoning ordinance or building code on Indian trust lands. The issue, of course, is different, but it is highly related in principle. The Circuit there recognized that the IRA was an expression of Congressional intent "that states had no power to regulate the Indian use or governance of the reservation provided, except as Congress chose . . . ." 532 F.2d at 658. The court read that statute and Public Law 280 as meaning that "Congress did not contemplate immediate transfer to local governments of civil regulatory control over reservations. . . . By transferring regulation of all matters of local concern to local governments, the tribal government would be left little or no scope to operate." *Id.* at 662.

Two observations:

(a) There was no such pattern of statutes to be taken into account in *United States v. Detroit, supra*, and yet here the courts are applying that case as though it were somehow parallel.

(b) Demonstrably, the county's tax is quite literally diminishing the scope of the tribal government's operation.

The opinion below does not consider whether this tax interferes with "a discernible federal policy to aid the Indian." The combined *Agua Caliente–Fort Mojave* record is solid with proof that the tax does just this. Let us put the matter with the most unvarnished simplicity. As *Agua Caliente* and this record make clear, the Indians will find it difficult to lease their lands unless they have an edge. The tax exemption is that edge. The whole purpose of Wheeler-Howard was to let the Indians develop the only asset that the dominant American community has left to them, their land. The tax, on a basis of the testimony of numerous expert witnesses including several from the Indian Bureau, clearly cripples that development and goes far to nullify that Congressional purpose. It certainly handicaps the capacity of the Indians to raise revenues by similar taxes of their own; the best example on this record is that the Indians have had to give up the right to tax their one California tenant, although they tax their Arizona tenant, and the important factor is the presence of the California tax.

4. The matter is important. *Agua Caliente* is a clear signal to let the possessory interest tax spread. In Arizona,

subsequent to the *Agua Caliente* decision, a measure of this sort has already passed one house of the legislature, S.B. 1190, 2d Sess. (Arizona, 1974), a matter of special importance because Arizona with its 17 tribes has by far the largest Indian population in the United States. Self-protection requires poor Indian tribes to engage counsel and wage lobbying activities in which they are, indeed, ill-matched against the revenue-hungry states.

We are, of course, aware that similar problems can arise in other contexts, *see United States v. County of Fresno*, 50 Cal. App. 3d 633, 123 Cal. Rptr. 548 (1975), a matter which was argued here on November 8 and 9, 1976. In that case, the issue was the applicability of the same California taxing pattern to government employees in government houses on forest lands. We assume that the decision in that case will settle the limited questions within its orbit, but we assume that the truly vast question of Indian land development will remain untouched.

5. We must forthrightly consider whether the decision in *Moe v. The Confederated Tribes*, 96 S. Ct. 1634 (1976) militates against the conclusion we urge. In *Moe*, the issue was whether a state sales tax on cigarettes could be enforced at smoke shops run by Indians on the reservation. Held, that the tax could not be enforced as to Indian purchasers but could be enforced as to non-Indian purchasers.

The court below found that *Moe* validated the instant tax. The difference is enormous. This Court in *Moe* found no significant competitive advantage to the Indian lost by the collection of the tax. Here we cannot escape the conflict of decisions of the two panels of the Ninth Circuit. In *Agua Caliente*, as already noted, the Circuit expressly acknowledged

that the burden of the tax fell on the Indians who obviously could not get the same price for their land if it was subject to taxation as would be the case if it were not. In the instant case the panel could only conclude that "it is possible" that either the non-Indian lessee or the Tribe would get the benefit of the exemption. On the actual facts in this combined record, it is conclusive that the tax has a chilling effect on the whole Indian leasing program and that it obliterates a significant competitive benefit which the tribe would otherwise have. It directly frustrates tribal self-government by nullifying or weakening the development program of the tribe.

The IRA is, of course, not to be read as some intriguing relic of the bright and visionary days of John Collier as Commissioner of Indian Affairs, and Harold Ickes as Secretary of Interior. The underlying policy remains solid. As recently as 1974, the Congress adopted the "Indian Self-Determination Act." The Congressional Declaration of Policy, 25 U.S.C. 450a(b), declares the federal purpose to be to permit "effective and meaningful participation by the Indian people in the planning, conduct, and administration" of the services to Indian communities. A blow at an effective tribal leasing or taxation policy is in the teeth of this declaration.

This Court has, within the year, recognized that of course a possessory interest tax amounts to a burden on the property itself. In *Williams v. Jones*, 326 So. 2d 425 (Fla. 1976), the Florida Court upheld a possessory interest tax on public lands as placing the users of such lands "on a parity with other real property in the private sector," 326 So. 2d at 430. This Court dismissed an appeal for want of a substantial federal question, *Williams v. Jones*, 97 S. Ct. 1934 (1976).

On its merits, the Florida case is immaterial here; the Florida tax is in effect on its own public lands. Its recognition, however, of where the burden of the tax falls is inescapable.

CONCLUSION

We respectfully submit that the question of whether the Indians are to be allowed to develop their reservation lands by leasing without having their economy crippled and their self-government efforts frustrated by local taxation on their non-Indian lessees is a genuinely important question which deserves resolution here. If the answer is yes, Indian economy can be expected to bloom and tribal government will become meaningful. If the answer is no, at least Congress will know what it must do if it desires to encourage this form of Indian development.

Respectfully submitted,

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1. 25 U.S.C. § 476, Paragraph 2:

"In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress. June 18, 1934, C. 576, § 16, 48 Stat. 987."

2. 28 U.S.C. § 1360 (b):

"Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

3. 18 U.S.C. § 1162 (b):

"Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property

in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE FORT MOHAVE TRIBE, by and through its TRIBAL COUNCIL in Class Action on behalf of all members of said Tribe,

Plaintiff,

vs.

THE COUNTY OF SAN BERNARDINO, a political subdivision of the State of California,

Defendant.

CV 73-2609-R

MEMORANDUM AND ORDER

[FILED: September 23, 1974]

Plaintiff THE FORT MOHAVE TRIBE asks this Court to re-visit its ruling in Agua Caliente Band of Mission Indians v. The County of Riverside, 306 F.Supp. 279 (C.C. Cal 1969) affirmed 442 F2d 1184 (9th Cir. 1971). Cert. denied, 405 U.S. 933 (1972).

In Agua Caliente (supra) the Indian lessor was relying on 28 USC § 1360(b) to claim the invalidity of California possessory interest taxes as applied to lessees of Indian lands. Here plaintiff relies on the exemptions provided by the Wheeler-Howard Act (Indian Reorganization Act of 1934). 25 USC § 461 et seq.

The facts here vary not one iota from those in Agua Caliente. Concededly the County of San Bernardino is collecting possessory interest taxes upon non-Indian lessees holding interests in leaseholds on Indian owned land. Only the statute claimed to create a different exemption is brought forward as the distinction. It is a distinction without a difference. To read the statutory language and to recognize the purpose of the legislation in both cases differently is not

supportable in fact or reason. Plaintiff's encumbrance argument is answered in Agua Caliente, 442 F.2d:

> "The California tax on possessory interests does not purport to tax the land as such, but rather taxes the 'full cash value' of the lessee's interest in it. Upon default in payment of the tax Indian lessor is not liable for payment of it and the Indian's title to the land is not encumbered." at page 1186 (emphasis added).

Plaintiff argues that the imposition of California's possessory interest tax involves double taxation. The position must fail for several reasons: first, the plaintiff's imposition of its own possessory interest tax suffers from the same infirmity as Agua Caliente 306 F.Supp. at page 284; second, the imposition of a tax on the same interest by the entity that leases the land (creates the interest) can hardly be distinguished from added rent; and third, plaintiff lacks standing to claim the infirmity of double taxation—that claim residing in the person being taxed.

This memorandum and order shall serve as findings of fact and conclusions of law pursuant to Federal Rules of Civil Procedure 52(a).

Judgment shall be entered for the defendant.

Dated: September 20, 1974.

/s/ Manuel L. Real
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

APPENDIX C

(Title of Action)
(FILED: September 28, 1976)

OPINION

Appeal From the United States District Court
for the Central District of California

Before: GOODWIN and SNEED, Circuit Judges, and King,* District Judge.

SNEED, Circuit Judge:

This case requires us to determine whether a possessory interest tax may be imposed on non-Indian lessees of property held in trust by the United States Government for reservation Indians. Five years ago we held, in Agua Caliente Bank of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971), cert denied, 405 U.S. 933 (1972), that such a tax was valid. The trial judge in the instant case found Agua Caliente to be controlling. We continue to support the holding of that case. We consider it proper, however, to look closely at the specific status of the Fort Mojave Indians in deciding whether the rationale of the Agua Caliente case should be applied to this situation. Also, it is important to review this area of the law in the light of recent Supreme Court decisions concerning taxation by state and local governments affecting Indians.

I. Factual Situation.

The Fort Mojave Tribe is organized under the provisions of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. §§ 461-479 (hereinafter called the "Act"), unlike

* Honorable Samuel P. King, United States District Judge for the District of Hawaii, sitting by designation.

the Agua Caliente Band. Thus, the Fort Mojave Indians operate under a recognized system of self-government, with a constitution and business charter which cannot be revoked or surrendered except by Act of Congress. All reservation land is held in trust for the Fort Mojave Tribe as a whole; no individual allotments were ever made under the General Allotment Act of 1867, 36 Stat 859, 25 U.S.C. § 331 et. seq.

The Fort Mojave Indians, as part of a plan for the economic development of their reservation, have entered into several 99-year leases with non-Indian lessees. The major development plans include a resort and housing project, as well as the possibility of building a major nuclear power plant. The reservation is located within three states, California, Nevada and Arizona. Since California is the only one of these three states that imposes a possessory interest tax,[1/] development of the California section of the reservation may be slowed.[2/] The Indians are opposing the California tax because they want to be able to make leasing decisions without regard to

1/ " 'Possessory interests' means the following:
(a) Possession of, claim to, or right to the possession of land or improvements, except when coupled with ownership of the land or improvements in the same person.
(b) Taxable improvements on tax-exempt land."
Cal. Rev. & Tax. Code § 107.

2/ The economic, as opposed to the legal, incidence of the tax sought to be imposed in this case is uncertain. Under certain assumptions with respect to the demand for the goods and services of the lessee the tax in question will fall entirely on the consumers of these goods and services. Under other assumptions with respect to such demand and with respect to the supply and demand for leasehold interests similar to that here being taxed, the tax in question will fall entirely on the lessee. Other assumptions with respect to these matters will place the burden on the Indians. Which assumptions correspond to the fact is unknown and probably not knowable. In this case, we proceed on the assumption that it is possible for the economic burden of the tax, in whole or in part, to fall on the Indians. We know not whether it is probable that it will do so.

the state in which the property is located. The Indians also object to the California tax because they have their own possessory interest tax. They fear that this "double taxation" will further impede development.

II. *Analytic Framework.*

The Supreme Court recently has outlined the general framework by which Indian jurisdiction and taxation cases are to be analyzed. In *McClanahan v. Arizona State Tax Commission*, 411 U.S. 165 (1973) the court states that "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption." Although the Indian sovereignty doctrine is still relevant, "because it provides a backdrop against which the applicable treaties and federal statutes must be read," it is no longer the proper major focus of analysis. *McClanahan, supra* at 172. Instead we must carefully analyze the applicable federal statutes to determine whether state action has been pre-empted. If not, the state statute need only satisfy the test laid down in *Williams v. Lee*, 358 U.S. 217 (1958), *viz.* that it not infringe on the rights of reservation Indians to make their own laws and be ruled by them. We turn now to an analysis of the applicable statutes as illuminated by recent Supreme Court decisions.

III. *Analysis of Statutes.*

A. The Indian Reorganization Act.

The Indians' major argument is that their status as a self-governing tribe organized under the provisions of the Indian Reorganization Act precludes the imposition of this tax by the County of San Bernardino. Section 16 of the Act 25 U.S.C. § 476 provides that "the constitution adopted by said tribe shall also vest in such tribe or its tribel council

the following rights and powers . . . to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe." The Indians argue that the imposition of a possessory interest tax on the lessee encumbers their reversionary interest in the land. Alternatively, they argue that the least itself is an "other asset" of the tribe which is encumbered if subject to taxation. We reject these arguments as going beyond the expressed Congressional intent in enacting the Act to further the achievement of economic independence for the Indians and the establishment of effective systems of tribal self-government. H. R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934).

While the imposition of a possessory interest tax on the leasehold interest will have an economic effect on the Indian lessors, and perhaps, although not certainly, will reduce the amount of rent they will be able to collect, the legal incidence of the tax clearly falls on the lessee.3/ The lessor will never be personally liable for any delinquent taxes arising under this taxing statute. Agua Caliente Band of Mission Indians v. County of Riverside, supra, at 1186. Cal. Rev. & Tax, Code, § 107; *cf*. Palm Springs Spa, Inc. v. County of Riverside, 18 C.A.3d 372; 95 Cal.Rptr. 879 (1971). Under these circumstances, there cannot be a direct encumbrance on the lessor's reversionary interest. Similarly, the lease, apart from the lessor's reversionary interest, even if considered an asset of the tribe, is not directly encumbered simply because the amount of the tax is determined by the value of the leasehold. Whatever may be the scope of the indirect burden placed on the lessor's interest in this case, we hold that it

3/ *See* n.2, *supra*.

is not sufficient to constitute an encumbrance of an "interest in land or other tribal asset."

Our conclusion is buttressed by the Supreme Court's decision in Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973). There the court, relying on the statement that section 476 of the Act was designed to encourage tribal enterprises "to enter the white world on a footing of equal competition," 78 Cong. Rec. 11732, found that traditional tax immunities had neither been expanded nor reduced by the Act Mescalero, supra, at 153-54, n.9. Because the court would not imply tax exemptions absent clear statutory guidelines it upheld the imposition of a state tax on the gross receipts of a ski resort operated by the Mescaleros on land located outside the boundaries of their reservation. We follow that lead here and refuse to find that the Act created a tax exemption for non-Indian lessees of Indian land. Congress has given no clear indication that such a result was desired. When such a signal is given, the state and local governments must retreat. B. Pub. L. No. 280

We turn to another relevant federal statute. California is one of the five states mandated by PL-280 to exercise both civil and criminal jurisdiction over the Indian country within their borders. Thus, both the Agua Caliente Band and the Fort Mojave Tribe are subject to California jurisdiction. Section 4(b) of PL-280, 28 U.S.C. § 1360(b), specifically provides that the grant of civil jurisdiction precludes taxation of "any real or personal property . . . belonging to any Indian or Indian tribe." We interpreted that language in Agua Caliente as not forbidding the imposition of a possessory interest tax on the lessee of Indian property. Agua Caliente, supra at 1187.

This holding has been strengthened by the Supreme Court's recent holding that PL-280 left traditional tax immunities intact, despite a transfer of civil jurisdiction to certain states. Bryan v. Itasca County, 96 S. Ct. 2102 (1976); Kirkwood v. Arenas, 243 F.2d 863 (9th Cir. 1957). We find the Supreme Court decision in Oklahoma Tax Commission v. Texas Co., 336 U.S. 342 (1949) a clear ruling that there was no tax immunity for non-Indian lessees prior to the passage of PL-280. Therefore, PL-280 provides no support for the argument that immunity should be extended to non-Indian lessees of Indian land.

Thus, we see that neither the Act nor PL-280 evidences a Congressional intent to preclude the taxation that is being challenged here. However, we cannot say that PL-280 directly authorizes such taxation. Bryan v. Itasca County, supra, forecloses the possibility of such a statement by specifically holding that the PL-280 grant of civil jurisdiction only confers jurisdiction over civil causes of action involving Indians. It is not a general grant of regulatory and taxing power over Indians. This is not, however, fatal to the state's cause. Although McClanahan, supra, held that, in the absence of Congressional consent, states are pre-empted from taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, the court specifically did not deal with "exertions of state sovereignty over non-Indians who undertake activity on Indian reservations." McClanahan, supra at 168. When the state action is directed at non-Indians, with only indirect effects on Indians or Indian lands, it is necessary to reconcile the federal preemption rationale with the state's recognized authority to regulate its citizens. McClanahan, supra at 179. Reconciliation requires that state legislation primarily directed at non-

Indian lessees of Indian land be considered as not automatically pre-empted by the federal government in the absence of specific authorization. See Thomas v. Gay, 169 U.S. 264 (1898); Utah & Northern R.R. v. Fisher, 116 U.S. 28 (1885). Cf. Bryan v. Itasca County, supra, n.2; Surplus Trading Co. v. Cook, 281 U.S. 647 (1930). But cf. Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 655 (1965). To permit such non-Indians to enjoy the immunity designed for Indians requires, we believe, a stronger Congressional signal than a statute which niether precludes nor authorizes the taxation in question. This does not contravene the maxim that ambiguous statutes should be construed to benefit Indians. The maxim was never intended to authorize constructions which, on their face, benefit non-Indians handsomely and Indians only marginally, if at all.[4/]

C. The Williams Test.

The final hurdle facing the county is the test formulated in Williams v. Lee, supra, to determine whether a statute not otherwise pre-empted is valid. The Williams, supra at 220, case held that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." The Court in McClanahan, supra at 179, specifically recognized that this test is principally applicable in situations involving non-Indians. The court stated: "In this situation, both the tribe and the state could fairly claim an interest in asserting their respective jurisdiction. The Williams test was designed to resolve the conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected." In

4/ The location of ultimate economic benefits and burdens of the tax in question is quite uncertain. See n.2, supra.

Williams, a non-Indian trader licensed by the federal government attempted to collect a debt owed him by an Indian by suing the Indian in state court. The Supreme Court found that allowing Lee to take the Indian into state court would "undermine the authority of the tribal courts over reservation affairs and would infringe on the right of Indians to govern themselves." Williams, supra at 220.

The interference with Indian self-government in the instant case is much less serious. No Indian or Indian land is being subjected to direct state court process. The only effect of the tax on the Indians will be the indirect one of perhaps reducing the revenues they will receive from the leases as a result of their inability to market a tax exemption. Such an indirect economic burden cannot be said to threaten the self-governing ability of the tribe.

The assertion that "double taxation," resulting from the imposition of a tax both by the county and the tribe, impairs the ability of the tribe to levy its tax is not persuasive. There is no improper double taxation here at all, for the taxes are being imposed by two different and distinct taxing authorities. The tribe faces the same problem as other taxing agencies confront when they seek to impose a tax in an area already taxed by another entity having taxing power. We hold that the uncertain economic burden here imposed on the tribe's ability to levy a tax does not interfere with their right of self-government.

Our holding is supported by the recent Supreme Court decision in Moe v. Confederated Salish and Kootenai Tribes, 96 S. Ct. 1634 (1976). There the court upheld the validity of a cigarette sales tax on reservation sales to non-Indians, while invalidating the imposition of such a tax on sales to tribe

members. When sales were made to non-Indians, the court found that it was "the non-Indian consumer or user who saves the tax and reaps the benefits of the tax exemption." In the instant case an analogous argument can be made. Although the location of the ultimate economic burden of the tax in this case is uncertain, it is possible that the benefits of the exemption would be captured entirely by the non-Indian lessee. It is, of course, also possible that the tribe would capture the entire economic benefit of the exemption. The removal of this possibility appears to us to constitute no more than a "minimal burden" such as in Moe was found not to "frustrate tribal self-government or run afoul of any Congressional enactment dealing with the affairs of reservation Indians." Moe, supra at 1637. Moe so held despite the fact that in that case the Indian seller did incur the legal burden of having to collect the tax. In the instant case, there is no legal burden imposed on the Indian lessor at all. In both cases, the Indians incur the possibility of an economic loss. However, the court in Moe did not consider that a sufficient burden to invalidate the sales tax as applied to non-Indians making purchases on the reservation. Therefore, we do not find in the instant case a sufficient burden on the tribe's ability to govern itself to justify striking down California's possessory interest tax as applied to non-Indian lessees of Indian land.

IV. Enforcement of the Tax as a Direct Encumbrance on the Land.

The Indians argued both in Agua Caliente and the instant case that the procedures available under state law to collect the tax [5/] could result in a direct cloud on their title and an

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5/ Cal. Rev. & Tax. Code §§2951-2963 (1974).

unlawful encumbrance on Indian real property. The court in Agua Caliente, supra n. 16, did not decide this question because it found that no attempt had yet been made to seize and sell any of the interests taxed and therefore the issue was not properly before the court. In the instant case the appellants give details of several situations in which notice of seizure was made and one case in which the sale was advertised before the lessee finally paid the tax. Nonetheless, there have been no completed tax sales and it is highly unlikely that any injuries to Indian rights will occur. The reasons for our confidence with respect to the future are two statutes, 25 U.S.C. § 415 and 25 U.S.C. § 476. The first requires the approval of the Secretary of the Interior of any lease of restricted Indian lands while the second explicitly gives the tribe the right to prevent the lease of tribal lands. We have no reason to believe these statutes will not be invoked to thwart tax sales contrary to the wishes of the Secretary and the Indians.

These statutes, designed to protect Indians, do not render the county powerless to enforce the tax here involved against the lessee. Even if his interest is treated by the assessors as "unsecured property," i.e., property insufficient to secure the payment of the tax, California law permits the seizure and sale of personal property, improvements, and possessory interests of the assessee. Cal. Rev. & Tax Code § 2951 (1974). California law also permits a direct suit to recover taxes against the owner of unsecured property against which taxes have been assessed; Cal. Rev. & Tax Code, section 3003.[6/] This case does not require us to trace out precisely

6/ For a description of the techniques under California law available to the County to enforce the tax, see Palm Springs Spa, Inc. v. County of Riverside, 18 Cal.App.3d 372, 375-76, 95 Cal. Rptr. 879, 881 (1971).

the accomodations which the county and the lessee must make to protect the Indians in the event the lessee defaults in payment of the tax here being challenged. Enough has been said to indicate that we are confident these accomodations are both legal and feasible.

Therefore, the California possessory interest tax is valid as applied to the non-Indian lessees of land within the Fort Mojave Indian Reservation and the judgment of the district court is affirmed.

AFFIRMED.

APPENDIX D

The AGUA CALIENTE BAND OF MISSION INDIANS, Plaintiff- Appellants,

v.

The COUNTY OF RIVERSIDE, Defendant-Appellee.

442 F2d 1184 (1971)

United States Court of Appeals, Ninth Circuit.
May 12, 1971.

. . . .

Before ELY and WRIGHT, Circuit Judges, and SMITH, District Judge.

RUSSELL E. SMITH, District Judge:

The Agua Caliente Band of Mission Indians (hereafter The Band),[1] together with individual members of The Band (hereafter the Allottees) appeal from a judgment of the District Court, 306 F. Supp. 279, refusing to enjoin the imposition of the California Possessory Interest Tax[2] on the lessees of the Indian land.

1. See 26 Stat. 712, January 12, 1891, 73 Stat. 602, 25 U.S.C. Sections 951-900 (1959).

2. " 'Possessory interest' means the following:
(a) Possession of, claim to, or right to the possession of land or improvements, except when coupled with ownership of the land or improvements in the same person.
(b) Taxable improvements on tax-exempt land. Except as provided in this section, possessory interests shall not be considered as sufficient security for the payment of any taxes. Leasehold estates for the production of gas, petroleum and other hydrocarbon substances from beneath the surface of the earth, and other rights relating to such substances which constitute incorporeal hereditaments or profits a prendre, are sufficient security for the payment of taxes levied thereon. Such estates and rights shall not be classified as possessory interests, but shall be placed on the secured roll.
In the event of delinquency in the payment of any installments of taxes on such leasehold estates or rights, they shall be subject to seizure and sale in the same manner as provided for

The Secretary of the Interior, acting under Congressional authority,[3] allotted to the individual members of The Band and to The Band itself a total of 26,646.28 acres in the area of Palm Springs, California. These lands are interspersed among non-Indian lands in a checkerboard pattern. The legal title to them is in the United States in trust. Of these lands 1250 acres including eight acres owned by The Band, are under long term leases, made as authorized by 25 U.S.C. Section 415 by the Allottees and The Band with the approval of the Secretary of the Interior. At the time the leases were executed all parties contemplated that the lessees would not be required to pay any taxes by reason of their use and possession of the Indian property.

Jurisdiction as to the claims of the Allottees is found in 28 U.S.C. Section 1331, and as to The Band in 28 U.S.C. Section 1331 and Section 1362, unless, as defendants claim, the court is deprived of jurisdiction by 28 U.S.C., Section 1341, which reads: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

This section has been held to be inapplicable to cases involving taxation of instrumentalities of the United States,

the seizure and sale of possessory interests in Sections 2914 and 2919, inclusive, at any time within three years after the delinquency. Suit may be brought against an assessee of such taxes in the event of delinquency in the payment thereof." California Revenue and Taxation Code, Section 107.

3. See footnote 1, *supra*.

at least in cases where the United States is a party.[4] Indian property uniformly is said to be an instrumentality of the United States.

> "Perhaps the most frequent reason stressed by the courts for the exemption of Indian property from State taxation is the Federal Instrumentality doctrine. The doctrine in its application to Indians and Indian property is founded upon the premise that the power and duty of governing and protecting tribal Indians is primarily a Federal function, and that a State cannot impose a tax which will substantially impede or burden the functioning of the Federal Government." Federal Indian Law, Dept. of Int., 1958, page 846.[5]

At the instance of the United States, as trustee, State laws taxing Indian property may be contested in the Federal District Court. An Indian, as the beneficial owner of lands held by the United States in trust has a right acting independently of the United States to sue to protect his property interests.[6] The reasons given in United States v. Livingston, *supra*, for exempting instrumentalities of the United States from the operation of 28 U.S.C. Section 1341 are no less

4. Department of Employment et al v. United States et al., 385 U.S. 355, 87 S.Ct. 464, 17 L.Ed.2d 414 (1966), United States v. Livingston, 179 F.Supp. 9 (E.D.S.C. 1959), affirmed without opinion 364 U.S. 281, 80 S.Ct. 1611, 4 L.Ed.2d 1719 (1960). It is to be noted that in one of these cases a public corporation was a co-plaintiff with the United States, and that in the other a private corporation was a co-plaintiff with the United States.

5. Cited in support: United States v. Rickert, 188 U.S. 432, 23 S.Ct. 478, 47 L.Ed. 532 (1903); United States v. Pearson, 231 F. 270 (8 Cir. 1916); Dewey County, S.D. v. United States, 26 F.2d 434 (8 Cir. 1928); cert. den. 278 U.S. 649, 49 S.Ct. 94, 73 L.Ed. 561 (1928); United States v. Thurston County, 143 F. 287 (8 Cir. 1906); United States v. Wright, 53 F.2d 300 (4 Cir. 1931), cert. den. 285 U.S. 539, 52 S.Ct. 312, 76 L.Ed. 932; Morrow v. United States, 243 F. 854 (8 Cir. 1917).

6. Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 88 S.Ct. 982, 19 L.Ed.2d 1238 (1968).

cogent when the right to the exemption is asserted by one who properly could be a co-plaintiff with the United States. We conclude that the District Court did have jurisdiction.

The California tax on possessory interests does not purport to tax the land as such, but rather taxes the "full cash value" of the lessee's interest in it.[7] Upon default in payment of the tax the Indian lessor is not liable for payment of it and the Indian's title to the land is not encumbered.[8]

A substantial amount of evidence was received bearing upon the economic effects of the tax upon the Indian. We conclude without it, that it, a lessee can afford to pay more rent if he is not required to pay a possessory interest tax. If an Indian's land is not subject to that tax he enjoys a better bargaining position than he otherwise would, and hence that the tax has an adverse economic effect upon him.

States may not without the consent of Congress tax the property of the United States,[9] nor may they tax instrumentalities of the United States.[10]

If the Indian as a beneficial owner of the land, the legal title to which is in the United States, is entitled to no more protection than the United States itself would enjoy, absent a congressional action forbidding the tax, then it is clear that the tax here imposed is valid. In United States v. City of Detroit, *supra*, (fn. 9) it was held that a tax similar to the California Possessory Interest tax could be levied upon a lessee

7. County of Riverside v. Palm-Ramon Development Co., 63 Cal.2d 534, 47 Cal. Rptr. 377, 407 P.2d 289 (1965).

8. Cal.Rev. and Taxation Code, Sections 2914-2919, 3003, 3101-3107.

9. United States v. City of Detroit, 355 U.S. 466, 78 S.Ct. 474, 2 L.Ed.2d 424 (1958).

10. See cases cited in footnotes 4 and 5.

holding land under a lease from the federal government even though the burden of the tax fell directly upon the United States. If it was not clear before, it is clear since United States v. City of Detroit, *supra*, that "the imposition of an increased financial burden on the Government does not, by itself, vitiate a state tax" and that the tax imposed upon the use of property is something distinct from a tax imposed upon the property itself. We conclude from this that the tax here is properly imposed unless it can be said that the legislation dealing with Indians and Indian lands demonstrates a congressional purpose to forbid the imposition of it.

Here, as in United States v. City of Detroit, *supra*, there is no statute which expressly forbids the imposition of a state use tax. The statutory law mentioning the taxation of these lands is found in an equalization act[11] and in a statute granting some measure of regulatory power to local governments.[12] If, as was said in United States v. City of

11. Public Law 86-339, Sept. 21, 1959, 73 Stat. 602, Sec. 5
"(a) The right to an equalization allotment or to a cash payment in lieu thereof pursuant to section 3, subsection (d), of this Act, shall be transferable by will or descent in the same manner as are trust payments under existing law and shall not be subject to State or Federal inheritence, estate, legacy or succession taxes.
(b) A cash payment made in lieu of an equalization allotment pursuant to section 3, subsection (d) of this Act shall not be regarded as income or capital gain for purposes of Federal or State income taxation and shall not, as long as it remains in the form of cash or a bank deposit in the ownership of the alottee, be subject to taxation as personal property."

12. 28 U.S.C. Section 1360. "(b) Nothing in this section (the one granting the regulatory power) shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such proper-

Detroit, *supra*, a tax upon the use of property is not a tax upon the property itself, then there is nothing in these statutes which expressly forbids the tax here imposed.

It remains however to determine whether from other legislation dealing with Indians and Indian land a purpose to exempt these allotments from the kind of a tax herein imposed may be found. The law initially authorizing the allotments[13] provides that the land shall be held in trust for the "sole use and benefit" of The Band or Allottees and that at the expiration of the trust period the land shall be transferred "free of all charge and encumbrance whatsoever." This language is identical with the language used in the general allotment Act[14] and in Oklahoma Tax Commission v. Texas Company, 336 U.S. 342, 69 S.Ct. 561, 93 L.Ed. 721 (1949) the Supreme Court refused to imply a tax exemption on the basis of that language. The general rule that tax exemptions are not granted by implication is applicable to taxing acts affecting Indians as it is to all others.[15]

The position urged by the Indians here was fully supported by Gillespie v. Oklahoma, 257 U.S. 501, 42 S.Ct. 171, 66 L.Ed. 338 (1922) wherein Mr. Justice Holmes said "A tax on the leases was a tax upon the power to make them and

> ty in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

13. 26 Stat. 712 (1891).

14. 25 U.S.C. Section 348.

15. Oklahoma Tax Commission v. United States, 319 U.S. 598, 63 S.Ct. 1284, 87 L.Ed. 1612 (1943). Squire v. Capoeman, 351 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 883 (1956) may point to, although it does not express, a different rule where the taxing power of the United States comes in conflict with the interest of the ward.

could be used to destroy the power to make them" and "the same considerations that invalidate a tax upon the leases invalidate a tax upon the profit of the leases, and stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards." That position however was specifically rejected in Oklahoma v. Texas Company, *supra*, and it is now untenable.

Appellants and *amicus curiae* press upon us the economic plight of the Indians and persuasively attack the concept that a tax upon the use of a thing is not a tax upon the thing itself, but as we see it these arguments are foreclosed by the decisions cited.[16]

The judgment appealed from is affirmed.

ELY, Circuit Judge (dissenting):

I respectfully dissent. The obligation of the federal government to its Indian wards, probably born of a collective national guilt, runs deep. It is federal policy, undeniable, if belated, that the Indian has a special status in our Country and that he is justly entitled to very special protection. I cannot join in stripping such a protection from the Agua Caliente Bank in the face of the overwhelming evidence that the tax in question amounts, in its effect, to taxation of the full value of Indian trust lands.

It is conceded by all concerned that were Riverside County's possessory interest tax imposed directly on the Indian

16. California has made no attempt to seize and sell the interest of the lessees in any of the property involved in this action, and it is unnecessary here to touch upon the problem which would be created were the State of California, by some process of seizure and sale, to endeavor to substitute in an Indian lease a new lessee in the absence of the consent of the Indians and of the Secretary.

lands, it would be unlawful. My Brothers, however, feel constrained by United States v. Detroit, 355 U.S. 466, 78 S.Ct. 474, 2 L.Ed.2d 424 (1958), to hold that "the tax imposed upon the use of property is something distinct from a tax imposed upon the property itself." They conclude the tax to have been validly imposed absent legislative immunization. They further rely upon Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342, 69 S.Ct. 561, 93 L.Ed. 721 (1949), to conclude that no such legislative immunization may be implied. I strongly disagree with both conclusions.

Detroit simply expressed the view, with which I have no disagreement, that the doctrine of intergovernmental immunity does not preclude state taxation of an entity *solely* because the burden of such taxation eventually falls on the federal government. If, however, an important federal policy conflicts with the goal of effective implementation of the state taxing power, I should think that the Supremacy Clause demands that the extent to which a state tax burdens the federal policy be an important factor in determining the validity of the tax. There was no such conflict in *Detroit.* Here, I submit, the conflict is unmistakable, and the burden onerous.

Moreover, even if the majority has correctly interpreted *Detroit*, the local tax here involved was illegal. The Agua Caliente lands were given "for the sole use and benefit" of the Band, to be conveyed at the end of the trust period "free of all charge or encumbrance whatsoever." The land involved in *Oklahoma Tax Comm'n* was allotted pursuant to a statute containing the same language, and my Brothers construe the opinion in that case as a refusal to imply a tax exemption from the language. But this, I submit, is an incorrect reading of that case. The court in *Oklahoma Tax*

Comm'n was addressing itself primarily to the constitutional status of lessees of government-owned lands, whether Indian trust or otherwise. The lessees in that case sought exemption as federal instrumentalities. "The respondents are 'private persons' who seek immunity for their property or gains because they are engaged in operations under a government contract or lease.' " 336 U.S. at 363, 69 S.Ct. at 572. Since the Indian lessors bore no tax burden, direct or indirect, the lessees were precluded from urging a derivative immunity from the Indian grant. "These cases present no question concerning the immunity of the Indian lands themselves from state taxation. *There is no possibility that ultimate liability for the taxes may fall upon the owner of the land.*" 336 U.S. at 353, 69 S.Ct. at 567 (emphasis supplied). The statutory implication which was rejected in that case was not urged from the Indian grant, but from the fact of the lease itself. No derivative Indian rights were asserted by the non-Indian lessees, and no Indian was a party to the action. Indeed, the crucial language of the statute was not discussed, or even mentioned!

Underscoring the limited relevance of *Oklahoma Tax Comm'n* is Squire v. Capoeman, 351 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 883 (1956). There, the Supreme Court, fulfilling a "clear 'duty to secure to the Indians all that by any fair construction of treaty or statute can be held to have been understood by them or intended by Congress[,] Minnesota v. Hitchcock, 185 U.S. 373, 402, 22 S.Ct. 650, 46 L.Ed. 954 (1902),' " actually did construe the "charge or encumbrance" language alleged to have been at issue in *Oklahoma Tax Comm'n.* Without reference to the *Oklahoma* case, the language was construed to include taxation.

The majority's footnote 15 gives inadequate expression to

the force of *Squire*. The case did not turn on the difference between state and federal taxation of Indian trust lands. Rather, the case stands for the proposition that the federal policy of protecting Indian wards is superior even to the need to collect revenue for the maintenance of the federal government itself. Surely, we should afford no less protection when the interest of the Indian ward is in conflict with an interest of a State. Some of the States were likely no less responsible than the Nation for alleged depredations of Indian property sometimes said to have caused the creation of federal trust status in the first instance. *Cf.* Note, 42 S.Cal.L.Rev. 101, 110 n. 42. (1969).

I would reverse.